STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Panel: Whitbeck, P.J., and Smolenski and Cooper, JJ.

PAUL DRESSEL and
THERESA DRESSEL,

Plaintiffs-Appellees,

v.

AMERIBANK,

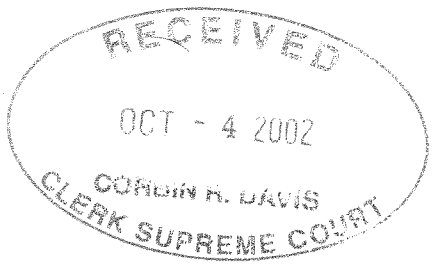
Defendant-Appellant.
_____/

Supreme Court Case No. 119959

Court of Appeals Case No. 222447

Kent County Circuit Court
Lower Court No. 98-013017-CP

APPELLEES' REPLY TO AMICUS BRIEFS OF HUNTINGTON NATIONAL BANK AND ROCK FINANCIAL CORPORATION



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Although Appellees are tempted to respond at length to the many distortions introduced by *amici* Huntington National Bank and Huntington Mortgage that find no footing in the record, Appellees will limit themselves to a response to Huntington and Rock's new claims that national banks may charge fees for preparing legal documents under 12 CFR 7.4002, which does no more than authorize national banks to assess "non-interest charges and fees including deposit account service charges." AmeriBank, of course, is not and never was a national bank, so Huntington and Rock's reliance upon this regulation in this case is inapposite.

In fact, the regulation Huntington and Rock cites did not even exist in its current form until July 2, 2001, years beyond the timeframe relevant here. On its face, the regulation does not authorize banks to engage in the practice of law, to do "law business," or to prepare legal documents.

Both federal courts and state courts, especially Michigan's, have been reluctant to interpret federal rules authorizing fees to preempt the basic infrastructure of state law directed at proscribing behavior, commercial or criminal. No authority (except for the highly suspect Illinois trial-level decision upon which Huntington and Rock rely) supports such a result.

A. THE HOME OWNERS LOAN ACT ("HOLA")

Although Huntington and Rock do not mention it, the OTC *amicus* Brief upon which they rely invokes not the National Bank Act, but the Home Owners' Loan Act ("HOLA"), 12 USC 1461 *et seq.* The regulations implementing HOLA include 12 CFR 560.2, a regulation which, in subsection (b)(5) authorizes the assessment of "loan related fees." Subsection (c) of the same regulation, however, provides:

> (c) State laws that are not preempted. State laws of the following types are not preempted to the extent they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section;

(1) Contract and commercial law;

(2) Real property law;

(3) Homestead laws specified in 12 U.S.C. 1462a(f);

(4) Tort law;

(5) Criminal law; and

(6) Any other law that OTS, upon review, finds:

(i) Furthers a vital state interest; and

(ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section. [emphasis supplied]

The interpretive notes the OTS issued when it promulgated §560.2 are quite instructive:

> Paragraph (c) describes certain types of state laws that OTS does not intend to preempt. Several commenters urged deletion of this paragraph. Commenters expressed concern that states seeking to avoid federal preemption of their laws or regulations might attempt to characterize those laws as falling within paragraph (c). Commenters contended that the language used to describe the categories of non-preempted laws was too broad and could create ambiguity about which state laws federal thrifts would be required to follow. For example, states might place laws purporting to regulate lending-related fees in the portions of state codes dealing with general contract or real property laws in an effort to avoid preemption.
>
> OTS believes that paragraph (c) should be retained in order to provide guidance regarding the scope of preemption intended by paragraph (a). OTS wants to make clear that it does not intend to preempt basic state laws such as state uniform commercial codes and state laws governing real property, contracts, torts, and crimes.
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> * * *
>
> When confronted with interpretive questions under §560.2, we anticipate that courts will, in accordance with well established principles of regulatory construction, look to the regulatory history of §560.2 for guidance. In this regard, OTS wishes to make clear that the purpose of paragraph (c) is to preserve the traditional infrastructure of basic

> state laws that undergird commercial transactions, not to open the door to state regulation of lending by federal savings associations.

61 Fed Reg 50951 at 50966 (1996) [emphasis supplied].

The laws upon which the Dressels rely – penal laws prohibiting the unauthorized practice of law by corporations (MCL 450.681) or any persons (MCL 600.916) – cannot be characterized as covert state attempts to regulate federal lending. Rather, they are precisely within the realm of criminal law and commercial regulation that is excluded from preemption by §560.2[1]

Put simply, the laws the Dressels seek to enforce are not laws regulating lending, they are laws regulating the practice of law.

B. THE NATIONAL BANK ACT

The regulation upon which the Illinois circuit court relied, 12 CFR 7.4002, authorizes national banks to charge "non interest charges and fees, including deposit account service charges." The circuit court cites Barnett Bank v Nelson, 507 US 25, 32-35 (1996) for the proposition that "Section 7.4002 constitutes a broad grant of authority to national banks." Oddly, Barnett Bank does not cite or relate to 12 CFR § 7.4002, and deals with different legislation authorizing banks to market insurance, 12 USC § 92.

While it is unclear what, if any, iteration of 12 CFR § 7.4002 the Illinois court relied upon (the only phrase quoted by the Illinois court misquotes both the original and amended statute), § 7.4002 was amended on July 2, 2001 to provide that "the OCC applies preemptive principles derived from the

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1 Note that any effort by the OTS to invade by regulation general state jurisprudence such as that governing the unauthorized practice of law would far exceed the rulemaking authority Congress gave the OTS in 12 USCA §§1463(a) and 1464(a). Even the authority the OTS claims in §560.2 presses hard against the limits of rulemaking authority provided by 12 USC §§1463(a) and 1464(a). Indeed the Michigan Court of Appeals in Konynenbelt v Flagstar Bank, 242 Mich App 21; 617 NW2d 706 (2000) app den. 463 Mich 972 (2001) specifically found that the OTS did not have a congressional mandate to occupy even the limited field of federal savings bank regulation.

United States Constitution, as interpreted through judicial precedent, when determining whether state laws apply . . .. "

In the relevant timeframe, however, this language read:

> (d) State law. The OCC evaluates on a case-by-case basis whether a national bank may establish non-interest charges or fees pursuant to paragraphs (a) and (b) of this section notwithstanding a contrary state law that purports to limit or prohibit such charges or fees. In issuing an opinion on whether such state laws are preempted, the OCC applies preemption principles derived from the Supremacy Clause of the United States Constitution and applicable judicial precedent.

There is absolutely no evidence that during the pendency of this regulation the OCC addressed either Michigan UPL statute, or issued an opinion that they were preempted. Neither the statute nor the regulations provides any evidence that either Congress or the Office of the Comptroller of the Currency intended the National Bank Act or its implementing regulations to be generally preemptive of laws regulating the practice of law. There is no authority at all supporting this conclusion.

C. COURTS CONSTRUE PREEMPTION NARROWLY

The courts, state and federal, have (with the exception of the Illinois state trial-court judge) consistently refused to read plenary preemption into legislation, much less regulations growing out of legislation. In Hillsborough County v Automated Medical Laboratories Inc, 471 US 707 (1985), the United States Supreme Court noted that inferring plenary preemption where none is expressly stated would violate the most basic principles of federalism:

> We are even more reluctant to infer preemption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence. See Jones v Rath Packing Co, 430 US at 525.

> Moreover, because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive.

Hillsborough County, 471 US at 717.

Neither the original nor the amended regulation expresses an intention to preempt state laws on a plenary basis, or specifically to preempt laws regulating the practice of law.

Michigan courts too disfavor broad readings of federal law which preempt the underpinnings of state law. In Konynenbelt v Flagstar Bank, FSB, 242 Mich App 21 (2000), app den. 623 NW2d 596 (2001) the plaintiff challenged Flagstar's $9 mortgage discharge fee on the basis that it violated a Michigan statute requiring mortgage lenders to pay the fee themselves. Flagstar argued that the authorization to assess fees in HOLA preempted state law, but the Court of Appeals disagreed, and this court declined further review.

Citing Siegel v American Savings & Loan Association, 210 Cal App 3d 953, 960-61, our Court of Appeals first rejected Flagstar's suggestion that federal regulation had "occupied the field":

> Flagstar argues that Congress' assumption of exclusive and plenary authority over all aspects of the operations of federal thrifts, including loans made on the security of residential real estate, is a clear expression of congressional intent to occupy the field. We disagree. Comprehensiveness of federal regulation alone is insufficient to establish implied preemption. *Siegel, supra.*

Konynenbelt at 31.

Konynenbelt teaches that "Michigan does not favor preemption by federal law, and in the absence of a regulation that clearly states that [state law requirements] are preempted, we do not find express preemption." Konynenbelt at 30.

Konynenbelt dealt with a statutory fee limitation and the Court of Appeals found no preemption. Here we are dealing with prohibitions against the unauthorized practice of law. Nothing in the National

Bank Act suggests such laws are preempted. The case for preemption in Konynenbelt was far stronger than the case here, yet the Court of Appeals found no preemption and this Court declined review.

B. THE RULE HUNTINGTON AND ROCK PROPOSE WOULD YIELD ABSURD RESULTS

If Huntington and Rock are correct that state laws requiring licensure to engage in certain businesses are preempted by federal regulations, lenders will be authorized to do a good deal more than practice law. Indeed, lenders would be authorized to perform - and charge for - a good many other services for which they are unlicensed, but which are related in some fashion to mortgage lending, including but not limited to:

Real estate appraisals	(MCL 339.2613-15)
Real estate surveys	(MCL 339.2004)
Real estate brokering	(MCL 339.2505)
Title insurance	(MCL 500.7302)
Credit life insurance	(MCL 550.619)
Practice of law	(MCL 600.916)
Residential contracting	(MCL 339.2403-05)

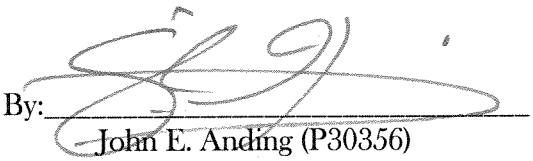
This construction of the National Bank Act proves too much. Nonsensical statutory interpretations must be avoided. Williams v. Cleary, 338 Mich 202; 60 NW2d 910 (1953).

CONCLUSION

Huntington and Rock, by making to this Court a last minute preemption argument neither bothered to rely upon in litigation to which they are a party, are simply throwing a handful of sand in the air in the hopes it will obscure this Court's vision before it comes to earth. There is nothing - - no Congressional statement of plenary preemption; no bureaucratic pronouncement of a desire for plenary preemption; no reported case law -- that supports a conclusion that any federal law permits any lender to encroach upon state laws regulating the practice of law.

Respectfully submitted,

DREW, COOPER & ANDING



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